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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1117

THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH THE DEPARTMENT OF PUBLIC WORKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 15–28) is reported at 208 F. Supp. 861. The opinion of the court of appeals (Pet. App. 29–46) is reported at 328 F. 2d 729.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1964. The petition for a writ of certiorari was filed on May 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent portions of Article III of the Constitution of the United States and of Sections 1251 and 1345 of Title 28 of the United States Code are set forth at pages 47–48 of the petition.

QUESTIONS PRESENTED

1. Whether 28 U.S.C. 1345 grants the federal district courts jurisdiction of an action brought by the United States against a State to recover damages and fire suppression costs resulting from the alleged negligent causing of and failure to extinguish a forest fire.

2. Whether, as so construed, 28 U.S.C. 1345 is constitutional.

STATEMENT

On April 10, 1962, the United States filed a complaint in the United States District Court for the Southern District of California alleging that employees of the Division of Highways of the State of California had negligently caused and failed to extinguish a fire which burned over some 24,000 acres in the Angeles National Forest and resulted in a loss to the United States of $479,194.43. The complaint alleged jurisdiction under 28 U.S.C. 1345 (Pet. App. 48).

On April 17, 1962, the district court, *sua sponte,* issued an order to show cause why the action should not be dismissed for lack of jurisdiction. After a hearing, the district court dismissed the suit for lack of jurisdiction.

On appeal, the Ninth Circuit reversed, stating that it was "satisfied that the Constitution grants original jurisdiction to the Supreme Court over civil suits brought by the United States against a State without specific consent regardless of the nature of the controversy, provided the issue is justiciable, and that the Constitution empowers Congress to confer upon the district courts concurrent jurisdiction over such suits" (Pet. App. 31). Tracing the history of what are now Sections 1345 and 1251 of Title 28, United States Code (Pet. App. 47–48), the court concluded that in Section 1345 Congress has granted such concurrent jurisdiction to district courts.

ARGUMENT

The court of appeals properly held that Section 1345 makes the district courts available as a forum for suits by the United States against a State and that the statute is constitutional. The decision gives effect to the clear provisions of Sections 1345 and 1251(b)(2) and is not in conflict with the decision of any other appellate court. Accordingly, there is no warrant for review by this Court.

1. Section 1345 gives the district courts jurisdiction, concurrent with the jurisdiction of this Court, over suits by the United States against a State. It reads as follows:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

This provision, by its terms, embraces the instant case unless it comes within an exception "otherwise provided by Act of Congress." There is no such exception.

As the court of appeals pointed out (Pet. App. 40–42), Section 1345 had its origin in the provision of Section 11 of the Judiciary Act of 1789 granting federal circuit courts "original cognizance * * * of all suits of a civil nature * * * where * * * the United States are plaintiffs" (1 Stat. 78). Section 13 of the same Act provided that the Supreme Court should have "exclusive jurisdiction of all controversie * * * where a state is a party" (1 Stat. 80). Accordingly, under these provisions which remained essentially unchanged until the revision of the Judicial Code in 1948, suits by the United States against a State were generally recognized as excluded from the jurisdiction granted to the lower federal courts.[1]

The 1948 recodification of the Judicial Code, 62 Stat. 869, 927, made significant changes. Congress reenacted the provisions of Section 11 as 28 U.S.C. 1345 but added the introductory phrase, "Except as otherwise provided by Act of Congress * * *." In

[1] Exceptions were made where particular statutes conferred jurisdiction on the district courts over suits brought by the United States. *E.g., Case* v. *Bowles*, 327 U.S. 92, 97; Sec. 205(c) of the Emergency Price Control Act, 56 Stat. 33, as amended. As the court of appeals pointed out, these statutes "were interpreted as permitting suit in such cases against a State, and as modifying to that extent the section 13 grant to the Supreme Court of exclusive jurisdiction over all suits against States" (Pet. App. 41). See statutes and cases cited, Pet. App. 41, n. 34.

addition, it revised the original jurisdiction of the Supreme Court, adopting the following provision as 28 U.S.C. 1251(b):

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> * * * * *
>
> (2) All controversies between the United States and a State;
>
> * * * * *

Obviously, the Congressional purpose was to give the district courts concurrent jurisdiction of controversies such as this between the United States and a State. Indeed, the decision of the district court in this case stood alone in holding that, following the 1948 revisions, Section 1345 did not vest jurisdiction in district courts over suits by the United States against a State.

There is no merit to petitioner's contention that the decision of the Fifth Circuit in *United States* v. *Alabama*, 267 F. 2d 808, vacated and remanded, 362 U.S. 602, is "in conflict" with the decision of the Ninth Circuit in the instant case and stands for the proposition that "an express act of Congress was necessary to confer jurisdiction on the district court" over suits by the United States against the State itself (Pet. 4). Despite broader language in the opinion, the only holding in *Alabama* was that Section 1971(c) of the Civil Rights Act of 1957, 71 Stat. 637, 42 U.S.C. 1971(c), did not create a cause of action for preventive relief against a State. Specifically, the court ruled that a State was not a "person" who could be sued as a party defendant

under the statutory provision which authorized the United States to bring proceedings for preventive relief when "any person has engaged * * * in any act" depriving persons of the right to vote by reason of race or color. It was apparently assumed that, absent the statutory authorization, the United States lacked sufficient interest to maintain a suit for redress of wrongs being done by a State to private citizens. The holding is obviously of no relevance here where a common law cause of action for damages exists and where the interest of the United States is clear.[2]

In any event, petitioner's argument (Pet. 4–6) that to give the district courts jurisdiction over suits by the United States against a State Congress must expressly divest the Supreme Court of a share of its original jurisdiction and confer that jurisdiction on the district court ignores not only the obvious meaning of the 1948 revisions of the Judicial Code but also the decisions of this Court in *Case* v. *Bowles,* 327 U.S. 92, and *United States* v. *California,* 297 U.S. 175. In both of these cases, which were decided prior to the 1948 revisions, the Court upheld district court jurisdiction over suits by the United States against a State under statutes which made no reference whatsoever to States as defendants. Petitioner does recognize that several lower court decisions have assumed that 28 U.S.C. 1345 confers jurisdiction on the district courts

[2] While the case was pending in this Court, Congress passed the Civil Rights Act of 1960, May 6, 1960, 74 Stat. 86, 92, 42 U.S.C. (1958 ed.) Supp. IV, Section 1971(c), expressly authorizing such actions against States. As noted by the court of appeals in this case (Pet. App. 45, n. 44), "The resulting interpretation was, in effect, reversed by the Congress."

of such actions, but claims that they are all distinguishable from the present case in that they involved federally protectable interests (Pet. 6–7, n. 2–3). Petitioner does not, and indeed could not, explain why a suit to recover for damages to a national forest does not involve a federally protectable interest.

2. The sole remaining question is whether Congress acted within the power conferred by the Constitution in authorizing suits by the United States against a State in the federal district courts in a case such as this. Petitioner concedes that the States, upon their admission to the Union, consented to suit by the United States in the Supreme Court (Pet. 10). It argues only that the judicial power conferred by the Constitution does not extend to suits by the United States against States in the inferior courts. The contention, however, finds no support either in the terms of the Constitution or in the decisions of this Court.

The concession that sovereign immunity does not preclude this suit is required by the authorities. Article III of the Constitution, the source of the judicial power of the federal courts, extends the judicial power to suits by the United States against a State without qualification as to subject matter. The fourth of the nine different categories of cases and controversies to which the judicial power extends is "Controversies to which the United States shall be a Party." The decisions of this Court make clear that no exception to the plain meaning of this clause exists because the other party to the suit is a State, irrespective of the nature of the cause.

In *United States* v. *North Carolina*, 136 U.S. 211, this Court entertained a common law action of debt by the United States against a State. Although no one argued the jurisdictional question, the Court was aware of the issue and assumed that it had jurisdiction, as it made clear two terms later in *United States* v. *Texas*, 143 U.S. 621, 642, where it said:

> It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.

Later, in *Minnesota* v. *Hitchcock, Secretary of the Interior*, 185 U.S. 373, this Court on its own motion raised the question of whether the case was one to which the judicial power of the United States extends. Passing other possible bases of jurisdiction, including the presence of a federal question, as unnecessary to the disposition of the case, the Court held that it had jurisdiction because the case was one "to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends." 185 U.S. at 384.

Petitioner's attempt to confine the federal jurisdiction over States to the Supreme Court lacks merit. Article III of the Constitution gives this Court

original but not exclusive jurisdiction over suits involving States, and this Court has many times held that Article III's grant of original jurisdiction is not a grant of exclusive jurisdiction. In *Bors* v. *Preston,* 111 U.S. 252, 256–261, and *Ames* v. *Kansas,* 111 U.S. 449, 462–471, the Court carefully considered the earlier cases bearing on the point, and laid great stress on the fact that the first Congress, in the Judiciary Act of September 24, 1789, 1 Stat. 73, 80–81, stated that the Supreme Court had exclusive jurisdiction in some cases involving ambassadors and States, and original but not exclusive jurisdiction of other suits involving ambassadors and States. 111 U.S. at 256–257, 463–465. The construction placed on the Constitution by the members of this first Congress is entitled to great weight because many of them had been members of the Constitutional Convention and "were, therefore, conversant with the purposes of its framers." 111 U.S. at 256.

Petitioner ignores *Bors* v. *Preston* and claims that the holding of *Ames* v. *Kansas* is an ambiguous dictum. We disagree, but in any event the Chief Justice devoted nine pages of his opinion to a discussion of the Court's exclusive and concurrent jurisdiction and the Court has many times since relied on *Ames* v. *Kansas* for the proposition that Congress can grant lower courts jurisdiction over States. *E.g., United States* v. *Louisiana,* 123 U.S. 32, 36; *United States* v. *California,* 297 U.S. 175, 187; *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 464; and *Case* v. *Bowles,* 327 U.S. 92, 97.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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